Chapter 5

A Functionalist Approach to Comparative Abortion Law

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This chapter critiques the present comparative methodology in abortion law and explores the possibilities of a new comparative approach. The current method relies on high-profile but dated constitutional abortion decisions from the United States and Germany. Courts continue to rely on these cases to justify their decisions as consistent with a modern, global convergence around women's rights and to minimize national resistance to contested law reform. These comparisons, however, oversimplify legal developments of the past forty years by focusing on constitutional norms and legislative regimes, rather than on the relationship between abortion law and practice.

Courts in countries as diverse as Portugal, South Africa, Mexico, and Colombia consistently refer to an emerging consensus on the liberalization, if not decriminalization, of abortion law. Each court has relied on comparative law to balance the rights of women with potential life and to position their decisions along a spectrum of legislative regimes on abortion. At one end of the spectrum, courts invoke the 1973 U.S. decision *Roe v. Wade*[1] as the high-water mark of liberalization and abortion-on-request. At the other end, courts rely on the then West German Federal Constitutional Court 1975 decision[2] to support protections for "unborn life."[3]

Based on a right of privacy, the U.S. Supreme Court in *Roe v. Wade* declared that women, in consultation with their physicians, are constitutionally entitled to elect abortion for any reason in the first trimester.[4] Thereafter the

state is permitted, though not constitutionally required, to regulate abortion to protect maternal health in the second trimester, and to protect potential life in the third.[5] Although based on a judicial interpretation of domestic constitutional rights, *Roe* became a global symbol of abortion rights that encouraged legislative liberalization around the world.[6] This was true even after the Supreme Court replaced its trimester framework with the more restrictive undue burden standard of *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[7] *Roe* "both informed and was informed by a larger global movement to recognize reproductive health and self-determination as integral components of women's equality."[8]

This is precisely the vein in which the South African Supreme Court of Appeal cited *Roe* to reject a constitutional challenge to the Choice on Termination of Pregnancy Act (CTOPA). Passed in 1996, the act substantially liberalized South Africa's abortion law, allowing abortion on request within the first twelve weeks of pregnancy.[9] In defense of the act, the Court quoted from *Roe* at length as a symbol of progressive reform inspired by women's autonomy and equality: "the same considerations as applied in the [United States] would compel one to conclude that our Constitution protects a woman's right to choose."[10] Referring to *Casey* as having "affirmed the essential findings of *Roe*,"[11] the Court used U.S. case law to defend a shared legislative framework—abortion on request—as the hallmark of progressive law.

The South African Court described German law, in contrast, as an exception to the international consensus.[12] In its1975 decision, the Federal Constitutional Court held that the German Basic Law imposes positive obligations on the state to protect the "unborn" or "developing life."[13] In the regulation of abortion, the German Court affirmed, "precedence must be given to the protection of the life of the child about to be born."[14] On this basis, the Court declared a dissuasive counseling regime unconstitutional,[15] and it affirmed that abortion could be made lawful only in exceptional circumstances (severe birth defect, a threat to maternal life or health, rape or incest, or a "general social situation" when continuation of the pregnancy would impose extraordinary burdens).[16] While the German Court reinforced the constitutional protection of potential life in its 1993 decision, it allowed a dissuasive or pro-childbirth counseling regime but required that abortion performed under it remain unlawful though unpunished.[17] These legislative permissions for abortion in the German case law—whether in indications or counseling—accord some respect to the rights of women, albeit always subordinated to the protection of unborn life.

U.S. and German case law now correspond to two ends of a spectrum of reform options that tied constitutional rights to legislative form. Often when courts cite the 1975 and 1993 German decisions, they do so for the constitutional protection of fetal life. In 2010, the Constitutional Court of Portugal upheld a law permitting early abortion with nondirective counseling and a three-day waiting period. Although the Court referred to women's rights in its holding,[18] it aligned with the German Constitutional Court and against the U.S. Supreme Court to make its decision palatable to anti-choice Portuguese residents. The Court was quick to contrast Portugal's law with what it perceived to be the U.S. standard, in which women make "spontaneous decisions."[19] Citing *Roe*, the Court argued that U.S. women make their abortion decisions alone, while Portuguese women have the support of the state in considering whether to choose abortion or childbirth.[20] In distancing the new law from that of the United States, the Court cited the 1993 German decision as an example of a legislative counseling regime that relies on social services and preventative, rather than punitive, measures to deter women from abortion.[21] The Portuguese and German legislative regimes, it argued, accomplish the same goals, among them, the protection of unborn life.

Increasingly, however, courts are finding the middle ground between U.S. and German case law to be a means to defend moderate reforms. "Meeting in the middle" was arguably the comparative approach taken in a 2006 Colombian case. The Constitutional Court of Colombia cited comparative abortion law to introduce limited exceptions to the country's criminal abortion prohibition, allowing for pregnancy termination in cases of risk to maternal health or life, serious fetal malformation, and pregnancy resulting from rape, incest, unwanted artificial insemination or implantation.[22] The Court cited the German Constitutional Court 1975 decision in affirming constitutional protection for unborn life,[23] but it noted that this protection did not require women to bring a pregnancy to term in instances of "extraordinary and oppressive burden," such as fetal anomaly, criminal act, or risk to life or health.[24] The trimester framework of *Roe*, the Court then explained, could be used to justify an indications-based legislative regime as a balance between the rights of unborn life and of women.[25] As pregnancy progresses, the Court reasoned, the constitutional protection of unborn life becomes stronger, permitting greater limitations on the right to abortion, except in instances in which a woman's life or health is at risk.[26]

A common pattern of comparative engagement emerges. U.S. and German case law is used—now in almost any combination—to legitimatize

abortion law reform. The comparative methodology may almost be thought of as one of anointment: a process employed ritualistically, to consecrate a law by the token reference to these historical authorities. Whether comparative law is cited to align a country's law with the United States in its affirmation of the rights of women, or with Germany in its affirmation of the protection of unborn life, or to suggest a compromise between the two, these comparisons provide a consistent and readily identifiable framework for adjudicating on abortion law reform.

The weakness of the methodology is that abortion law reform is evaluated, as well as legitimatized, against a highly stylized, abstract set of rights demarcated by what the U.S. and German decisions have come to represent. What abortion law reform achieves in practice—be it access, prohibition, or compromise—is not assessed, comparatively or otherwise. Constitutional litigation simply does not serve this purpose. The case law sets up an abstracted relationship of legislative form to constitutional rights: we must have limitations to or grounds for abortion in order to protect unborn life; we must have freedoms to respect the rights of women. What either means for access to abortion services—whether services are more available, more affordable, or more convenient to access—is not within assessment. There appears to be faith in liberal laws promising liberal access, and in restrictive laws restricting access. But empirical studies, often in the field of public health, show this faith to be unfounded. Neither legislative form nor constitutional norm wholly determines the practice of abortion. Formal legal rules are not necessarily the rules of access.

The objective of this chapter is to offer an alternative comparative methodology that privileges an assessment of abortion laws in their functional capacity, that is, a methodology that studies how law functions in practice to facilitate or to impede women's access to safe abortion. I ground this *functionalist approach* in public health law, a discipline suited to understanding the gaps between law and practice.

The chapter is set out in three parts. The first part takes up the challenge first posed by Günter Frankenberg to show "what is left out, marginalized, or taken for granted by the official discourse" of comparative constitutional abortion law.[27] This part describes the inadequacies of the current favored methodology, focusing on how courts misconstrue the state of abortion law in the United States and Germany and thereby perpetuate a myth about the relationship between legislative form and abortion practice. Permissive laws, in other words, do not always result in permissive access, and the same holds

true for restrictive laws and practice. This section concludes by considering why courts nonetheless remain committed to this formalist comparative method.

The second part proposes an alternative comparative method, described as functionalist in that it focuses on how legal norms influence the practice of abortion. This section describes the value of a functionalist approach, namely in the way in which it can develop an expanded understanding of different types of legal rules—formal, informal, and background—and their relationship to one another and to the delivery of abortion services.

The third part locates this alternative functionalist approach within the emerging field of public health law research and its methodologies. Public health law research proves instrumental in the study of abortion law because it starts from the premise that rules outside of formal abortion law shape practice. It thereby seeks to discover and to describe these local influences. This section explores the promise of two research methods in particular: implementation studies and field-based assessments.

The chapter concludes by suggesting that advocates can begin to change courts' comparative engagement on abortion law reform by introducing functionalist considerations into their briefs, that is, by combining legal argument with the lived practice of abortion.

The Limitations of the Current Comparators

Current comparative references to U.S. and German abortion law may be unrecognizable to those living under the law in the United States or Germany. Take the 2010 decision of the Constitutional Court of Portugal as an example. The Constitutional Court of Portugal described U.S. abortion law as the height of liberalization—abortion is treated in law as an entirely private decision, to be made by the woman alone at any time and for any reason. Legislative developments after *Roe* make this a questionable assertion. Counseling requirements and waiting periods are widespread across the United States and, moreover, have been declared constitutional by the U.S. Supreme Court time and time again.[28] Contrary to the Portuguese Court's description, women are hardly "alone" in their decisions but encounter a dense network of laws that make abortion anything but a "spontaneous" undertaking.

Courts citing comparative law are not necessarily concerned with the practice of abortion under the laws they cite. Interestingly, the suggestion that the

United States and Germany are at the opposite ends of a spectrum marked by liberalization and criminalization may be flipped. Abortion services are less available in certain regions of the United States, where women have a constitutional right to abortion on any ground before viability, than they are in Germany, where abortion remains an unlawful, though not a punishable, act.[29]

German women, for example, appear to have several choices of counseling centers, some of which offer minimal counseling that sounds in tones of women's rights rather than protection of fetal life. In a report issued by the European Women's Health Network, a counseling center, Pro Familia, stated its position as letting women decide whether to continue pregnancies on their own, "as a consequence of the human right to family planning."[30] For women who are "undecided," Pro Familia's advice "consider[s] different world-views, . . . a secular concept of human being, [women's] individuality, equality of rights and . . . autonomy."[31] Groups like Pro Familia maintain that this style of counseling complies with German law because it is consistent with "science and the respect for the final decision and responsibility of the woman (openness of result)."[32] In the United States, in contrast, it is common for states to statutorily require that information about possible physical or psychological consequences of abortion and about the development of the fetus be given to the deciding woman.[33] Several states mandate that women receive counseling information detailing only negative risks, including suicidal tendencies,[34] infertility,[35] depression, anxiety, and eating disorders.[36] A handful of laws inaccurately link abortion to breast cancer or include information about fetal pain.[37]

The cost and affordability of abortion might also cause one to question assumptions about the nature and operation of U.S. and German abortion law. In Germany, over 80 percent of the country's abortions are state funded through the state welfare program. This includes abortions with counseling, which remain formally unlawful but unprosecuted, when women demonstrate financial need. In contrast, almost 60 percent of U.S. women pay out of pocket for abortion services,[38] and only 13 percent of women receiving abortions in the United States rely on some form of state funding.[39] Enacted in response to the *Roe* decision, the Hyde Amendment bars the use of certain federal funds, including Medicaid, the health insurance program for low income Americans, to pay for abortions with the exception of threat to the pregnant woman's life and in cases of incest or rape.[40] As Mary Anne Case summarized, in the United States abortion is "famously protected, but unsubsidized," but in Germany it is "at once condemned and subsidized."[41]

Given these realities of access under the U.S.-German constitutional regimes, why do the almost forty-year-old comparisons persist? This question is even more striking considering that courts citing comparative law seem unconcerned with fidelity to the letter of the law. For example, although the Portuguese Court in its 2010 decision aligned itself with German precedent, it upheld nondirective counseling that resembles the counseling proposed in German legislation, which the German Constitutional Court struck down in 1993 for being too neutral in respect to the value of potential life. The South African Supreme Court of Appeal similarly quoted from *Casey* to support a holding that minors can seek abortion without parental permission. Yet in *Casey*, the U.S. Supreme Court upheld a Pennsylvania law that required parental permission.

Courts' willingness to oversimplify the authorities they cite may be an effort to fix the law to the facts. In other words, courts confer legal authority to new legislative or constitutional interpretations in order to open access to abortion, and citation to foreign comparators is one means to justify that exercise of power. But the question remains, why do courts need comparative legal authority, especially when the standards cited no longer seem to have the influence attributed to them? Why do courts so assiduously resort to comparative legal authority, even when they undermine their own credibility in its misstatement?

First, comparative constitutionalism has gained traction as the global recognition of rights became increasingly important to social justice movements. Over the last several decades, international and national organizations, with the mission of advocating for reproductive rights and bringing about abortion law reform, have made significant gains in marrying human rights and women's reproductive health before national courts.[42] Reva Siegel recently mapped how feminists successfully challenged criminal abortion laws in the 1960s and 1970s by arguing for women's rights to control their reproductive lives and against state imposition of traditional sexual mores.[43] U.S. and German abortion jurisprudence reflects this activism, responding to and incorporating feminist claims.[44] The U.S. and German case law represent, in the abstract, judicial assertion of constitutional rights to strike down abortion legislation, which has been conceived as the lynchpin of legal and social reform.

Since the 1990s, women's rights groups have played a crucial role in urging courts to liberalize abortion laws, relying on the comparative experiences of other countries and human rights principles. Comparative examples travel,

in part, because they are used as evidence that countries are moving toward a consensus on expanded rights to abortion. For example, in liberalizing the Colombian law, the Constitutional Court stated that "sexual and reproductive rights . . . have finally been recognized as human rights, and as such, belong to constitutional law, a fundamental basis for every democratic state."[45] These rights recognize and promote "gender equality in particular and the emancipation of women and girls [as] essential to society."[46] Comparative law and international human rights law are described in the same section of the Colombian decision and support the same objective—to align the court with international trends that earmark progress and modernity.[47] The same can be seen in Portugal, where the Constitutional Court defended a liberal abortion law as following a model "widely prevalent" in Europe,[48] in compliance with human rights standards.[49] A circular issued by Portugal's Ministry of Health likewise announced that "the government's recent decriminalization of abortion represents a move toward joining the most modern, developed and open European societies."[50]

Second, the comparative examples of U.S. and German law travel because they serve formalist ends, in that they stand for an easy typology of reform. Grounds or time limits are often used as the metric for whether laws are restrictive or progressive. The purpose is to describe what the law allows formally per statute, code, or constitution. Fernanda Nicola has described this comparative methodology broadly as "comparison by columns," or "comparing the language of legal norms understood as positive law in specific legal regimes."[51] Comparative law by columns is a snapshot in time of what countries either permit as reasons for abortion or consider justifiable exceptions to criminal prohibitions that have been codified into law. A formalist approach succeeds at fitting all law reform into prescribed boxes of what formal law allows.

Consider a map of the world's abortion laws, published by the Center for Reproductive Rights.[52] Countries are shaded a different color depending on whether the country: prohibits abortion altogether; permits abortion only to save the woman's life; permits abortion to preserve physical health, to preserve mental health, or on socioeconomic grounds; or permits abortion without restriction as to reason. The map helpfully provides a snapshot of countries' laws on the books and the level of global support for different types of abortion law. Because of its format and function, however, the map cannot represent the nuance of how law is implemented, interpreted, or ignored. The map does not depict how the law functions in practice.

In comparative law theory, the critique of comparativism being overly formalist is longstanding. Comparative inquiries of the late 1800s and early 1900s were "dubious and non-scientific typologies of the world's legal systems based on a crude evolutionary model of social and legal development."[53] Said another way, the comparative project for most of its history has been concerned with categorizing laws and distinguishing between legal systems.[54] Yet a defining debate in comparative law is whether comparison should merely seek to categorize the formal laws of countries, or whether comparative examples should expose the deep differences between laws that appear similar.[55] Does comparison reveal shared doctrines, which can apply across borders, or are laws on abortion too divergent, too local, too embedded in culture to harmonize? Can laws on reproduction be meaningfully compared?

These questions challenge the practice of comparing formal laws for the purpose of showing a trend toward liberalization, without regard to the local and regional practices that shape how law is interpreted and implemented.[56] Darren Rosenblum, writing about comparative approaches to women's rights, envisions a comparative approach as a means "to acknowledge vast differences in national legal cultures" and "to expose important weaknesses in the neorealist understandings of human rights."[57] If the purpose of comparison is "emphasizing difference over universality," comparative examples can help uncover "the dynamic interaction between law, culture, and context."[58]

Comparative inquiry in abortion law, at present, makes little room for considering how law intersects with culture and context.[59] One reason for this deficiency is that the constitutional rights and legislative forms compared in U.S. and German case law represent only a narrow slice of the legal rules and norms that affect abortion practices. A critical comparativist, however, might look to foreign examples to yield insights into implementation and effectiveness of legal reform.[60] Instead of starting from the formal law on abortion (permitted grounds or timing for legal abortion), a comparative inquiry might ask: how do women seek abortion inside and outside of law? That is, what forms of regulation facilitate or impede abortion access in a country? Comparison of constitutional rights, and of abortion statutes, is important, but a singular focus on these forms of law may not account for the other legal rules that shape abortion access on the ground.

Legal Rules and the Functionalist Approach

The dominant comparative approach may allow courts to justify abortion law reform, but it does so in formalist terms that channel that reform into predetermined regimes, marked by permission for certain legal grounds or time limits. Abortion in practice tests the meaningfulness of these formal categorizations. A country with a functioning but submerged market for abortion may be coded as restrictive, but women may gain access to abortions for which the formal law does not account. Conversely, the law on the books may grant broad legal permission for abortion services, but practical impediments and other legal rules may make it difficult for women to gain access. To understand how abortion services are provided under the law, a new comparative method is needed—one that may be described as functionalist insofar as it focuses on how legal norms influence the practice of abortion. This requires an expanded appreciation of formal, informal, and background rules and their relationship to one another and to abortion services.

Formal Rules

The study of abortion law is often limited to the formal rules of constitutional rights and largely penal statutory provisions. There are, however, other kinds of formal rules that directly shape abortion practice. These include guidelines on health service delivery. Health care guidelines are rules of particular importance to a functionalist approach because, as the recent World Health Organization (WHO) *Safe Abortion: Technical and Policy Guidance for Health Systems* signals, guidelines seek to provide technical assistance and to create tools to help health providers and women negotiate health systems.[61] Guidelines are issued, in other words, because the constitutional or statutory law that structures the health system does not itself provide sufficient direction to guide practice. For this reason, some countries use administrative processes to clarify the terms of access to lawful abortion, especially after constitutional or statutory reform.

For example, in 2010, Kenya adopted a new Constitution states that, "Abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law."[62] Evidence suggested, however, that the terms of permission were not widely understood or being fully implemented. Sections of the Kenyan penal code had not been

revised to reflect the language of the new Constitution, and thus the law formally reflected a contradiction in permission.[63]

Despite a "liberalized" law and concerted efforts to promote contraception, sex education, and post-abortion care, the numbers of unsafe abortion and related maternal deaths in East Africa remained among the highest in the world. The Kenyan Ministry of Medical Services responded in 2012 by issuing service delivery guidelines for abortion care, the purpose of which was to improve the quality of care in health facilities across the country.[64] The guidelines clarified the constitutional permissibility of abortion; provided detailed standards for who may perform an abortion, with what training, and in what facilities; and recommended well-being and options counseling to prevent unsafe abortion if permission was denied. The guidelines emphasized the importance of appropriate clinical assessment of patients terminating pregnancies and the importance of preventing infection and disease, as well as protecting the patient's dignity, privacy, and comfort.

The Kenyan Ministry of Medical Services intends frontline health workers to use these guidelines when treating women seeking reproductive services and designed the guidelines to aid in decision making about patient care. The guidelines, in other words, are expressly intended to change the practice of abortion, and the success of the guidelines is measured against resulting improvements in women's health. It is this orientation of the guidelines that mark them as an important formal rule to study in a functionalist approach. A functionalist method starts by "identifying the purpose of a rule" and then "provid[ing] a standard by which the merits of the rule can be evaluated: how well do [rules] serve their purposes."[65] That is, if the purpose of a guideline is to reduce unsafe abortion and related mortality by increasing access to lawful abortion and averting unsafe abortion practices, then the abortion law may be assessed against both these ends.[66] The enactment and content of guidelines—what they target—reveals and describes the current dysfunctions of the law they seek to redress.

Like a rights-based approach, however, guidelines are dependent on state implementation for their success. In Colombia, lawyers returned to court following the 2006 judicial liberalization to ask for government-issued guidelines on the legal duties of health professionals and state officials.[67] The Colombian Ministry of Social Protection in response issued guidelines to define the limits of providers' lawful exercise of conscientious objection, to instruct providers on what constitutes "good medical attention," and to require basic insurance coverage for abortion.[68] The guidelines themselves,

however, ultimately proved ineffective. Like the constitutional and statutory law they were intended to implement, the guidelines too remained vague and unenforced.[69] Guidelines, as other formal rules, may be difficult to implement when the enforcement powers of the state are weak, suggesting that both the source of and remedy for the problem lie elsewhere. This is an insight gained by examining the effect of formal rules and seeking to identify why they succeed or fail in practice. If there are severe limitations on state enforcement—on which constitutional law, statutory regimes, and guidelines depend—then the promulgation of additional formal rules is likely to do little to solve enforcement or implementation problems.

The underenforcement of formal administrative measures, like guidelines, proves only half the problem. New standards for providers and facilities can open up access, but these rules can also impose bureaucracy or create processes that deter women from seeking legal abortions.[70] In 2007, the Legislative Assembly of Mexico City redefined the crime of abortion as the interruption of pregnancy after the twelfth week of gestation and established that, prior to that point, termination of a pregnancy for any reason was a free health service available in public hospitals, regardless of the patient's financial need.[71] However, a recent study revealed that, even though abortion care is free in public facilities, many women still seek informal or private services due in part to privacy concerns and bureaucratic hassles.[72] In 2012, Colombian advocates brought a case on behalf of a minor who had complied with all the requirements for a legal abortion, but was forced to continue her pregnancy after ten weeks of administrative delays.[73] One question a functionalist approach might ask is how revision of formal laws influences previously complicit, indifferent, or somewhat supportive providers to oppose abortion. In Colombia, women knew where to obtain abortions before liberalization and their choices were "socially tolerated" by health professionals; after the Constitutional Court judgment, physicians expressed skepticism and hesitation about deciding whether a termination fit within the legal grounds.[74] These are again findings learned only from watching the practice under the rule, rather than assuming that a practice necessarily follows the rule. A comparative functionalist method uses a legal rule to investigate the variable practices around and within it.

This orientation avoids, for example, a simple dichotomy of defining abortion practice as either legal or not legal. Rather the approach asks how practice itself shapes the formal rules, sometimes effectively changing the meaning of the rule. Informal practices can fold into formal rules that

straddle legality and illegality, such as in the case of "menstrual regulation."[75] Joanna Erdman discusses the prevalence of practices that skirt or reinterpret the law, using "menstrual regulation," a practice relied on by women in various jurisdictions, as an example.[76] Women approach health care providers, including midwives, after they miss a menstrual cycle.[77] The provider performs an early medical or surgical abortion to "start menstruation." Because a woman never confirms her pregnancy by taking a pregnancy test, the provider and patient do not consider it a termination.[78] Formal legal rules have most profound effect on abortion practice in the shadow of the law.

Informal Rules

Courts and advocates typically conflate illegal abortion with the risks of unsafe abortion as the problem that formal law cures. In Portugal, the Constitutional Court's decision reflects women's rights advocates' argument that if the law did not allow time-limited abortion, women would inevitably seek dangerous, illegal terminations.[79] According to the Court, this was "the empirical reality of social life" and "incontrovertible data gathered from past experience."[80]

For many women in many countries, however, this is not the reality. In countries like South Africa and Colombia, a well-known informal sector for abortion provision persisted well after legal reform.[81] In South Africa, the illegal abortion rate remains high despite the CTOPA, which guarantees abortion on request through twelve weeks of pregnancy.[82] Studies in Colombia demonstrate that self-induced abortion via over-the-counter drugs persists even for women who could have obtained legal abortions.[83] Given that formal rules may not govern practice as expected or as designed, recognizing and understanding the complex informal norms and rules that govern abortion makes the practice of abortion law intelligible. We might consider, for example, countries with state tolerance of widespread quasi- or extralegal abortion practice.[84]

The increasing availability of safer self-use methods, such as misoprostol, is challenging the common pairing of illegal and unsafe abortion. Multicountry surveys conclude that "misoprostol is widely available" and that "there is an informal network of medical providers and pharmacists" who dispense the drug for pregnancy termination.[85] This "network" is often expanded to include "partners, family and friends, and lay or traditional healers," who offer advice about where to find the drug and how to use it.[86] The nonprofit

organization Women on Waves, for example, maintains country-specific hotlines that explain to callers how to order misoprostol, how to use it, what to do if complications arise and provide other information relevant to self-administered abortion. Generally, the drug's appeal is its low cost and the option to administer at home and the ability it allows for the woman to think about the termination in whatever terms suit her personal beliefs.[87] Where state power is diffuse and state resources are limited, reformers might concentrate on building the capacity of these informal networks. State authorities may even allow efforts to strengthen informal avenues if such measures alleviate the burdens or costs of unsafe abortion and avoid the public controversy of law reform.[88]

It is a mistake, however, to pretend informal practices are not without their own dysfunctions or controversies. When administered according to clinical instruction, the majority of women who use misoprostol complete their abortions without any complications.[89] But without information, instructions, and supplies, women can face serious consequences from unsupervised or incorrectly supervised use.[90] Given inevitable variations among localities' informal networks, as well as in information and drug availability, self-induced termination will not be an acceptable or viable option for certain populations of women.

Nevertheless the fact that some women in some jurisdictions self-use misoprostol, after formal liberalization, is a valuable insight into the relationship between abortion law and practice. Informal norms or rules can help advocates assess what statutory or regulatory interventions will be more or less useful in protecting women's reproductive health.[91] This requires, however, a more pragmatic comparative method, one that analyzes how law reform intersects with the culture of abortion practice. Close engagement with existing attitudes as well as family and community structures through which informal networks operate—considerations largely absent from current litigation strategies—might help reproductive rights advocates and others see new opportunities and costs of law reform.[92] Strategies that cater to tailored, local solutions, with the backdrop of state resources, require learning from local and informal practice.

Background Rules

To learn from practice, however, requires attention not only to the practice itself, but also to the environment of that practice. In the field of public

health law research, Scott Burris gives the example of how land-use laws are pivotal to understanding the efficacy of health care policies: laws governing land use determine options for physical activity, levels of environmental threat, and access to geographically bound services.[93] Understanding how these factors interact with and influence health depends on participatory research that "enlists community members as full partners [and] promises to ground research in local knowledge while at the same time unleashing community capacity."[94]

Background rules include statutes, regulations, and policies that govern health services, families, and individual or group conduct, but do not specifically regulate abortion. These laws nonetheless play an important role in influencing abortion practice. For example, spousal support and child care policies influence many women's choices about pregnancy by shaping their relationships to and responsibilities for partners, parents, or existing children. In many ways, this is already explicit in abortion counseling requirements that include description of the social resources available to mothers and pregnant women. One can think of these counseling scripts as providing a list of the background rules that shape women's roles as caretakers. Broader regulations on health resources within a country's primary care system are background rules that affect abortion practice. The World Health Organization, in its *Safe Abortion: Technical and Policy Guidance for Health System*s, takes up this issue. It notes that abortion service delivery depends on employment policies to recruit diverse health care professionals, such as nurses, midwives, and health care assistants, and that these policies should standardize how professionals are licensed and what tasks they may perform.[95] Reproductive health campaigns also increasingly recognize that tackling problems in the primary health care system are critical strategies for improving abortion access.[96]

As with informal rules, it is exceptionally difficult to identify background rules from a formalist methodology alone because their influence depends on context and law in practice. An appreciation of how background rules operate fits with a broader trend in comparative law that embraces legal realism and expresses an appreciation for ethnographical research—"the concrete study of norms in their regulatory context."[97] The next section of the chapter turns to research methods by which a comparative functional approach can be undertaken.

Functionalist Research Methods

A functionalist comparative methodology can be found in the emerging field of public health law research (PHLR). This discipline has received increasing attention in recent years because it offers a methodology to improve "investment in and implementation of [health] policy" by collecting data.[98] PHLR studies health outcomes and externalities and seeks to understand these outcomes by using monitoring and evaluation tools. This depends on not only knowing the law but also understanding the social determinants of health, which, as Scott Burris recently noted in the context of the U.S. health care system, means studying family income, social and class status, and other individual and aggregate characteristics.[99]

Public health law research can impart invaluable lessons about how abortion is practiced under law. Among the most important, PHLR starts from the premise, which it more often than not confirms, that the influence of rules other than formal law shape abortion practice. That is, constitutional provisions and criminal prohibitions do not exclusively define "law." Moreover, it is on-the-ground implementation that matters: "It is not just the formal rules, but how these rules are enacted every day in offices by case workers—and clients—who have their own understandings of what the law is, how it relates to other set of rules, and how it can advance or hinder their own goals."[100]

Indeed, a premise of PHLR is that law cannot be taken for granted as a determinative factor in why certain health outcomes occur.[101] PHLR asks, is law having an effect and what sort of effect does law have? Researchers look outside of law to other strategies that can help explain law's effects. To that end, PHLR describes a legal rule and how it operates—does law deter or shame or incentivize or educate?[102] Strategies for reform are then tailored to and around law's influence and function. In reviewing laws that criminalized the unprotected sex of HIV positive individuals, researchers studied the role of self-reporting behavior and whether deterrence, norms of procedural justice, or stigma caused people to comply, ignore, or disobey the law. Researchers concluded that easing access to condoms, altering the physical layout of sex venues, and improving employment among at risk populations helped reduce HIV transmission.[103] The policy prescription was not to strengthen criminal prohibition or rewrite poorly drafted statutes.

In this vein, what might prove important to the study of abortion law is how formal law works in unintended ways, often frustrated by competing background and informal rules. This is what marks PHLR as distinguishable

from other kinds of public health research. It evaluates not only the effectiveness of public health intervention in abortion practice, but also the effectiveness of *law* as the tool used to implement or facilitate the intervention.[104] It can provide meaningful comparison by asking what a law achieves and *why* within a given context.

Methodology tools range from quantitative studies of rates and percentages of the number of abortions performed, and by what method and under what circumstances, to qualitative research interviews of women seeking (and providers delivering) services. A key research tool in the field is an implementation study. The method is broadly defined as "the process of putting a law into practice . . . [focusing on the] mediating factors, including the attitudes, management methods, capacities and resources of implementing agencies and their agents; the methods and extent of enforcement; the relationship between the legal rules and broader community norms; and the attitudes and other relevant characteristics of the population whose behavior is targeted for influence."[105]

An implementation study, for example, would examine why women continue to resort to clandestine abortion methods even after law reform. Why in South Africa, even after Parliament amended the law to allow nurses to perform early-term abortions and to increase the number and distribution of approved facilities, do women continue to resort to informal practices?[106]

Rachel Jewkes and her colleagues examined that question. They first reviewed the methods by which women procured abortions, such as through traditional healers, providers working outside of law, or self-induction using medicines.[107] Researchers conducted interviews with women who had resorted to illegal abortion, despite living in a metropolitan community where legal services were available. Researchers spent a total of three weeks with 151 women presenting at hospitals with incomplete abortions and gathered information through questionnaires as well as one-on-one conversations.[108] The study found that most women did not know the CTOPA existed, and, when they had knowledge of the CTOPA, many women did not know the circumstances or the facilities in which an abortion could be performed.[109] For other women who knew what the law provided, they preferred self-induced abortion because they distrusted the health care system, faced long delays in obtaining legal services, or feared the negative attitudes of physicians and health care staff.[110] Thus, the Jewkes study suggests a need for policies and programs that meet those concerns—services, attitudes, education—rather than revision of statutory text or *more* law.

The WHO's *Safe Abortion: Technical and Policy Guidance for Health Systems* offers another public health law methodology—"field-based assessment," which assesses the needs of the community and the capacity of the current system to meet those needs. WHO guidelines recommend that small-scale changes should be undertaken first to determine the feasibility of legal intervention before proposing sweeping law reform. The WHO advises that "it is important that actions to strengthen policies and services are based on a thorough understanding of the service-delivery system, the needs of providers, the needs of women, and the existing social, cultural, legal, political and economic context."[111] This context assessment could include many background rules of influence: laws on sexuality and contraception, policies setting the curricula of medical and other relevant professional schools; rules governing private and public health insurance or other measures that reduce out-of-pocket expenditure.

The purpose of these research methods, including the implementation of pilot programs, is to determine the effect of new rules. Moving from assessment to pilot programs to broader reform, the WHO calls for systematic approaches to "scaling-up," that is, expanding or citing successful legal interventions to recognize "real-world" complexity, with multiple (and often competing) participants and interests. The WHO guidelines acknowledge that "attention to technical concerns is essential, but equally important are the political, managerial and ownership issues that come into play, since interventions to improve access and quality of care often call for changes in values as well as practices."[112] "Scaling-up" is inherently a comparative project that takes as its goal improvement in abortion practice. It models an alternative way of seeing routes to reform, outside of litigation and outside of a closed set of formal rules.

Returning to the example of South Africa, a report on provider attitudes toward the country's abortion services[113] relied on in-depth interviews and discussion groups in eight public hospitals, four nongovernmental organizations, and two clinics linked to educational facilities. Researchers interviewed abortion providers, physicians who did not provide abortion, nurses, and counselors. The study is an example of "scaling-up." Researchers found that health care providers were an impediment to abortion access for reasons of "circumstance and personal interest," which included religious or moral refusal, but also misunderstandings of what law required, lack of facility resources (too many patients, not enough space or beds, for example), and fears of being ostracized given the still prevalent stigma surrounding abortion.[114]

Thus, the report focused first on steps that might address microlevel and community needs, such as increasing providers' compensation. After addressing these measured interventions, the report turned to broader recommendations on the background conditions of health care, including counseling and support for providers and rewards for quality health care services. The study, of note, did not focus on maneuvering judicial or legislative processes.[115]

The approach this chapter describes embraces a certain amount of divergence and disagreement about how to reduce mortality and morbidity for women. How law influences health outcomes; the external and internal pressures on state and community resources; and the bureaucracy of health agencies and administration will change from region to region, place to place. Comparative questions provide a shared starting point: what are the structural and operational determinants for implementing new policies? What individual and system characteristics allow health systems to develop legal initiatives that promote better health care?[116] It is a framework in part defined by what it is not. That is, this approach suspends the assumption that law has a direct or immediate or even a necessarily casual relationship with health outcomes.

Conclusion

A concluding question for this chapter might concern how functionalist comparisons should travel. Advocates bring cases and shape litigation, and often their strategies transfer from case to case. Reproductive rights advocates support the use of comparative and international law in their legal advocacy, but along conventional lines of formalist analysis. In the South African litigation, for example, a brief filed on behalf of the Reproductive Rights Alliance, a nonprofit organization, outlined the comparative arguments that surfaced in the Supreme Court of Appeal's opinion.[117] The brief referred to "three basic human rights norms that protect reproductive rights: freedom, human dignity, and equality;"[118] it then proceeded to rely on U.S. law and legal literature.

This suggests that advocates are important in defining the terms of comparison, as they are often the experts providing courts with information about abortion law at home and abroad. Advocates' briefs could use this influence to introduce a new form of comparative legal argument premised on

a functionalist approach. Taking the South African litigation as an example, imagine a strategy in which the purpose of jurisprudential borrowing would be to elucidate implementation problems that may or can follow newly articulated rights. Such a comparative methodology would be concerned with what is compared and with the reasons for comparison: not to authorize a legal reform, but to ask what makes it a legal reform worth adopting, what are its benefits, and what are its risks.[119] Thus, instead of mining foreign texts for support for rights, the Reproductive Rights Alliance might have considered why women continue to consult traditional healers first before seeking care in health institutions,[120] or contemplated the need for information campaigns in rural areas, or explored the option of supporting self-induced medication abortion.[121] This suggestion is not intended to minimize the resources and time that infusing practical considerations, grounded women's experiences, takes. The advantage of a comparative project is that it is one in which models are shared and evolve across countries and time, and is also one in which lessons about gathering useful data and using it effectively travel. Legal advocates' writings could be a means to share this information among national reform projects—not only the solutions for reform, but also the ways of asking questions about reform. Such a methodology may better approach law and interpret rights and rules, vis-à-vis practice.